

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

IN THE MATTER OF THE WINDING DOWN OF:

THE NEW HAMPSHIRE MEDICAL MALPRACTICE
JOINT UNDERWRITING ASSOCIATION

No. 217-2015-CV-00347

**RECEIVER'S MOTION FOR ORDER APPROVING TRANSFER OF REMAINING
ASSETS, LIQUIDATING AND DISSOLVING THE NHMMJUA, DISCHARGING THE
RECEIVER, ENTERING RELATED INJUNCTIONS, AND CLOSING PROCEEDING**

John R. Elias, Insurance Commissioner of the State of New Hampshire

("Commissioner"), as Receiver ("Receiver") of the New Hampshire Medical Malpractice Joint Underwriting Association ("NHMMJUA"), with the assent of court-appointed Class Counsel in the *Tuttle* Class Action, also counsel to certain policyholders appearing in this proceeding, moves for an order in the form submitted herewith approving transfer of the remaining NHMMJUA assets, liquidating and dissolving the NHMMJUA, discharging the Receiver, enjoining claims against the NHMMJUA and the Receiver, and closing this proceeding. As reasons therefor, the Receiver respectfully states:

1. This proceeding was commenced on July 21, 2015 pursuant to the then recently enacted statute providing for the winding down of the business of the NHMMJUA through a receivership pursuant to RSA 402-C. See RSA 404-C:15 - :17, enacted by 2015 N.H. Laws 263. On July 22, 2015, the Court entered its Rehabilitation Order pursuant to the NHMMJUA closure statute. Affidavit of Peter A. Bengelsdorf, Special Deputy Commissioner, in Support of Closure of Receivership ("Bengelsdorf Aff.") ¶ 2.

2. The winding down of the NHMMJUA through a receivership as directed by RSA 404-C:15 - :17 has been accomplished as described below. As required by RSA 404-C:17, II(a), the NHMMJUA's administrative, operational, and coverage-related obligations, including the NHMMJUA's tax obligations and all receivership expenses have been resolved or transferred. Assets remain after the payment of the final expenses, and RSA 404-C:17, III provides for transfer of those remaining assets to the *Tuttle* Class Action (Merrimack County Superior Court docket no. 217-2010-CV-00414). Accordingly, the Receiver requests that the Court approve (a) transfer of the remaining assets to the *Tuttle* Class Action, (b) liquidation and dissolution of the NHMMJUA, (c) discharge of the Receiver pursuant to RSA 404-C:17, II(b) with related injunctions, and (d) closure of this proceeding. Bengelsdorf Aff. ¶ 3.

The Receivership

3. Coverage Obligations. RSA 404-C:16 directed the Receiver to wind down the business of the NHMMJUA seeking to facilitate the payment of all policyholder coverage obligations in full and in the normal course of business. As reported in the Receiver's monthly reports, the Receiver non-renewed policies with renewal dates on and after January 1, 2016. See RSA 404-C:15. After a competitive bidding process, the Receiver entered into an Assumption Agreement with The Medical Protective Company ("MedPro"). The Assumption Agreement provided for MedPro to assume the NHMMJUA Obligations as defined in the agreement. The Court approved the Assumption Agreement, as amended, on August 5, 2016. The Assumption Agreement transaction closed, and MedPro assumed the NHMMJUA Obligations in exchange for a payment of \$23,156,298.22, on August 25, 2016. Since that time, claims and policyholder service have been the obligation of MedPro and have been handled by MedPro without involvement of the Receiver. Bengelsdorf Aff. ¶ 4.

4. Taxes. On February 21, 2017, the Receiver filed the NHMMJUA's final federal and state tax returns. The Receiver also filed a federal Form 4810 "Request for Prompt Assessment" to trigger an 18-month period for the United States Internal Revenue Service ("IRS") to act on open tax years and made a similar request for action to the New Hampshire Department of Revenue Administration ("DRA"). On May 26, 2017, the IRS notified the Receiver that the closing date for the tax year 2013 would be September 23, 2017, and the closing date for the 2014 and 2015 tax years and the 2016 stub year would be September 2, 2018. The Receiver did not receive any IRS tax due notices for these years by the closure dates, so these years are closed. As to past state tax years, the Receiver and the DRA executed an Audit Agreement resolving all state tax issues for open tax years in September 2017, and the Receiver received a refund payment of \$400,000 in October, 2017. Bengelsdorf Aff. ¶ 5.

5. Transfer of Excess Assets. The NHMMJUA closure statute provided for the Receiver to transfer assets remaining after court approval of the Receiver's transfer of coverage-related obligations, payment of administrative and operation expenses, transfer or resolution of tax obligations, and payment of receivership expenses into the *Tuttle* Class Action. RSA 404-C:17, III. On February 21, 2017, the Receiver filed a Motion for Approval of Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17. The motion was later amended, and on September 11, 2018, the Court entered an Order Approving Interim Distribution, Interpleader and Related Discharge of Receiver authorizing the Receiver to distribute \$60,000,000 from the assets of the NHMMJUA to the Citizens Bank account of Nixon Peabody, LLP as Class Counsel, Account Number 1013340, established pursuant to order of the Court (the "*Tuttle* Class Action Account") and discharging the Receiver from any obligations or

liabilities with respect to the transferred funds. The Receiver paid \$60,000,000 to the *Tuttle* Class Action Account on September 13, 2018. Bengelsdorf Aff. ¶ 6.

6. On October 30, 2018, the Receiver filed a Motion for Approval of Second Interim Distribution, Interpleader and Related Discharge Pursuant to RSA 404-C:17 requesting approval of a transfer of \$25,736,000 to the *Tuttle* Class Action Account. On November 8, 2018, the Court entered an Order Approving Second Interim Distribution, Interpleader and Related Discharge of Receiver authorizing the Receiver to distribute \$25,736,000 from the assets of the NHMMJUA to the *Tuttle* Class Action Account and discharging the Receiver from any obligations or liabilities with respect to the transferred funds. The Receiver paid \$25,736,000 to the *Tuttle* Class Action Account on November 15, 2018. Bengelsdorf Aff. ¶ 7.

7. Stabilization Reserve Fund (“SRF”). On March 16, 2018, the Receiver filed a Motion for Approval of Return of Stabilization Reserve Fund Excess to Health Care Providers. The Court granted the motion and issued an Order Approving Return of Stabilization Reserve Fund Excess to Health Care Providers on March 30, 2018. The Receiver followed the process set forth in that order and returned SRF amounts totaling \$1,779,658.54 to providers. On April 3, 2019, the Receiver delivered the remaining \$1,497,586.17 in unclaimed SRF funds to the Abandoned Property Division of the New Hampshire Treasurer’s Office in accordance with paragraph 8 of the order. Bengelsdorf Aff. ¶ 8.

8. Hardship Fund. The NHMMJUA closure statute required the Receiver to establish a hardship fund to be used for hardship claims of certain NHMMJUA policyholders. RSA 404-C:16, III. The Receiver established the fund and moved for approval of a hardship grant process, which the Court approved on October 1, 2015. The Receiver subsequently received hardship grant applications, submitted recommendations for approval of determinations

on those applications, and paid the hardship grants that were approved by the Court. On October 3, 2018, the Receiver filed a motion requesting approval of Endowment for Health, Inc., as the charitable organization to receive the remaining hardship fund in accordance with RSA 404-C:16, III. The Court approved that organization by order dated October 16, 2018. On May 3, 2019, the Receiver moved for approval to transfer the \$1,950,395 remaining in the hardship fund to Endowment for Health. The Court approved the transfer on May 21, 2019, and the funds were transferred to Endowment for Health on May 24, 2019. Bengelsdorf Aff. ¶ 9.

9. Expenses. As reported in the Receiver's monthly reports, the Receiver has paid the expenses of the NHMMJUA and the receivership on an ongoing basis during the receivership. The expenses for May 2019, including \$13,574 for Hays Group, \$5,214 for the Special Deputy Commissioner, and \$8,496.13 for Rackemann, Sawyer & Brewster, have been paid. The final expenses for June 2019 are being paid as described below. In light of this motion, the Receiver will not file any further monthly Receiver's reports. Bengelsdorf Aff. ¶ 10.

10. Disposal of Records. On May 20, 2019, the Receiver moved for approval to dispose of the NHMMJUA's records and the records of the receivership pursuant to RSA 402-C:50, subject to certain records being transferred to the New Hampshire Insurance Department. The Court approved disposal of the records except those to be transferred to the Department on May 22, 2019. The Receiver is in the process of disposing of the records and expects that process to be complete by late June 2019. Bengelsdorf Aff. ¶ 11.

11. Assets. As set forth on the attached Statement of Net Assets for May 2019, the assets of the NHMMJUA as of May 31, 2019 totaled \$458,094. Net assets as of May 31, 2019 (after accruals for anticipated interest and incurred but unpaid administrative expenses for May

2019) totaled \$428,811. As of June 8, 2019, the NHMMJUA assets were held in a checking account at Bank of America. Bengelsdorf Aff. ¶ 12.

Closure of the Proceeding and Discharge of the Receiver

12. After disposal of the records, all that remains to do in the receivership is the payment of final receivership expenses, the transfer of the remaining funds to the *Tuttle* Class Action Account, and obtaining the discharge of the Receiver and closure of the proceeding. Bengelsdorf Aff. ¶ 13.

13. The NHMMJUA closure statute provides for the conclusion of the receivership in RSA 404-C:17, II, which states:

The NHMMJUA shall be liquidated and the receiver discharged upon:

- (a) The resolution or transfer of all of the NHMMJUA's administrative, operational, and coverage-related obligations, including the NHMMJUA's tax obligations and all receivership expenses; and
- (b) The approval of the supervising court.

The statute also provides that prior to the discharge of the Receiver, all remaining assets shall be transferred to the *Tuttle* Class Action. RSA 404-C:17, III. The requirements of RSA 404-C:17, II(a), have been satisfied as described above, and the remaining assets will be transferred to the *Tuttle* Class Action Account as described below. See Bengelsdorf Aff. ¶ 14.

14. To avoid the potential problems presented if the receivership remains open due to a pending closure motion after all assets have been paid out, the Receiver proposes that the Court enter an order approving the liquidation and dissolution of the NHMMJUA and the discharge of the Receiver (a) subject to transfer of the remaining assets to the *Tuttle* Class Action Account and (b) effective upon the Receiver's filing of a certificate that the remaining funds have been transferred to the *Tuttle* Class Action Account. A proposed form of order and Receiver's certificate are submitted herewith. Bengelsdorf Aff. ¶ 15.

15. To finalize expenses, the Special Deputy Commissioner requested that service providers issue invoices for June 2019 consisting of costs through June 14, 2019 and estimated costs through the end of the proceeding. The final expenses of the NHMMJUA receivership are: (a) Bank of America fees of \$264.62; (b) fees for Hays Group's services in disposing of records (paper and electronic), handling payments and accounting, and other services incidental to closing out the NHMMJUA of \$35,069.57; (c) fees for the Special Deputy Commissioner's services in closing out the NHMMJUA, including supervising the disposal and transfer of records, preparation of court filings, payments of invoices, transfer of funds, and closing of the bank account of \$5,643.24; (d) fees for Rackemann, Sawyer & Brewster's services regarding closure of the NHMMJUA, including preparation of court filings, disposal and transfer of records, and other services incidental to closing the NHMMJUA of \$11,304.92; (e) consultant fees for IT services of \$545.50; and (f) fees for Leone, McDonnell & Roberts's services in disposing of records of \$2,670.00. These final expenses total \$55,497.85 and are in the process of being paid. (The Receiver does not anticipate any additional final expenses. If there are any, they will be listed on the Receiver's certificate.) Bengelsdorf Aff. ¶ 16.

16. After payment of these expenses from the assets remaining after payment of the May expenses and addition of the May interest of \$2,367, the Receiver expects that there will be \$377,678 in remaining NHMMJUA assets. Following the Court's order, the Receiver will transfer these remaining NHMMJUA assets to the *Tuttle* Class Action Account. Bengelsdorf Aff. ¶ 17.

17. The proposed order provides for the liquidation and dissolution of the NHMMJUA effective upon the filing of the Receiver's certificate. The NHMMJUA closure statute provides that the NHMMJUA is to continue as a legally cognizable unincorporated

association “[u]ntil liquidated.” RSA 404-C:16, VI. The insurer liquidation statute, RSA 402-C (applicable to the NHMMJUA under RSA 404-C:15, I, :16, VI, and :17, I), provides that dissolution of an insurer “shall be effected by operation of law upon the discharge of the liquidator.” RSA 402-C:23.

18. The proposed order also provides for the discharge of the Receiver in accordance with RSA 404-C:17, II, and related injunctions barring claims against the NHMMJUA and the Receiver. Since the NHMMJUA will be liquidated and dissolved, the Receiver discharged, and all assets of the NHMMJUA distributed, it is appropriate to permanently enjoin any claims or actions against the NHMMJUA (including its administrators, consultants, agents and attorneys) and the Receiver (including the Special Deputy Commissioner and the Receiver’s administrator’s, consultants, agents and attorneys). Such orders are within the Court’s equitable powers and are also appropriate under RSA 402-C:48, I (“The court may grant the discharge and make any other orders deemed appropriate.”).

19. Finally, the proposed order provides that this proceeding will be closed effective upon the filing of the Receiver’s certificate.

WHEREFORE, the Receiver requests that the Court issue an order in the form submitted herewith:

- A. Granting this motion;
- B. Approving transfer of the remaining NHMMJUA assets to the *Tuttle* Class Action Account; liquidating and dissolving the NHMMJUA; discharging the Receiver and enjoining all claims or actions against the NHMMJUA and the Receiver; and closing this proceeding; and
- C. Granting such other and further relief as equity and justice may require.

Respectfully submitted,

JOHN R. ELIAS, INSURANCE COMMISSIONER OF
THE STATE OF NEW HAMPSHIRE, SOLELY AS
RECEIVER OF THE NEW HAMPSHIRE MEDICAL
MALPRACTICE JOINT UNDERWRITING
ASSOCIATION

By his attorneys,

JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

J. Christopher Marshall, NH Bar No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
christopher.marshall@doj.nh.gov
(603) 271-3650



J. David Leslie, NH Bar No. 16859
dleslie@rackemann.com
Eric A. Smith, NH Bar No. 16952
esmith@rackemann.com
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

June 21, 2019

Certificate of Service

I hereby certify that a copy of the foregoing Receiver's Motion for Order Approving Transfer of Remaining Assets, Liquidating and Dissolving the NHMMJUA, Discharging the Receiver, Entering Related Injunctions, and Closing Proceeding and the proposed order were sent this 21st day of June, 2019, by first class mail, postage prepaid to all persons on the attached service list.



Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

)
)
IN THE MATTER OF THE WINDING DOWN OF:)
)

No. 217-2015-CV-00347

THE NEW HAMPSHIRE MEDICAL MALPRACTICE)
JOINT UNDERWRITING ASSOCIATION)
)
_____)

SERVICE LIST

Kevin M. Fitzgerald, Esq.
W. Scott O'Connell, Esq.
Nixon Peabody LLP
900 Elm Street, 14th Floor
Manchester, NH 03101-2031